SUMMARY of COOPERATIVE CASES

Prepared by

RAYMOND J. MISCHLER, *Attorney*
OFFICE OF THE GENERAL COUNSEL, U.S.D.A.

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMER COOPERATIVE SERVICE

LEGAL SERIES NO. 14 SEPTEMBER 1960

TABLE OF CONTENTS

The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

EXCLUDIBILITY OF REFUNDS ON LANDLORD-TENANT PATRONAGE

(Producers Gin Association, A.A.L.,33 T.C. 608 (1959)

The Tax Court held in this case that a non-tax-exempt farmer cooperative may exclude from gross income "as true patronage dividends" amounts paid only to the landlords on landlord-tenant patronage where the agricultural product was jointly owned and the landlord acted not only for himself but as agent for his tenants.

The cooperative, a gin, had bylaws under which it was clear that nonmember patrons were to participate in patronage dividends on the same basis as member patrons. A substantial portion of the cotton ginned was grown by sharecroppers under an arrangement whereby the cotton belonged to the landlord and sharecropper jointly. The landlord delivered the cotton to the gin, and, in doing so, disclosed the joint ownership to the gin. The gin listed the names of the landlord and tenant as owners on its ginning tickets which reflected the amount of cotton ginned, the weight of the bales of lint cotton and the seed resulting, the ginning charges, the proceeds from the sales of seed and the net amounts due the owners. Similarly, the patronage dividends and rebates were computed separately for each lot of cotton belonging to the landlord and the particular tenant. Although the seed proceeds and patronage dividends were generally paid to the landlord, the gin supplied him with a record of the amounts due to him and the particular tenant in respect of each lot of cotton. In a formal contract (the pertinent paragraph of which is set forth in full in the court's opinion) executed by the landlord with the gin for the ginning of the cotton and the handling of the cottonseed, the landlord declared himself to be agent for his tenants.

For exempt cooperatives the rule would seem to be somewhat more stringent than laid down in this case. It will be recalled that the Internal Revenue Service, in Rev. Rul. 55-496, C.B.1955-2, 268, held that a marketing association which otherwise qualifies for exemption will not be denied such exempt status if it markets for members products furnished by nonmember producers, provided (1) the member is legally bound under an agency agreement to turn back to such producers the proceeds of the sale of their products,

less necessary marketing expenses, and (2) the member is legally bound to furnish the association evidence that such obligation has been met. Also, the value of the products of the nonmembers must be classed as nonmember business.

# # #

INSURANCE CONTRACT - CONSTRUCTION - ESTOPPEL

(C.& L.Rural Electric Cooperative Corporation, et al, v. Robert Kincade, Eva Kincade, and W.S.Kincade, Defendants and third party plaintiffs, v. American Casualty Company of Reading, Pennsylvania, Third party Defendant - 183 F. Supp.935)

This is a "third-party" action by a contractor against its liability insurer to recover under a liability policy for contractor's liability to cooperative against which contractor's injured employee had recovered judgment after which cooperative secured judgment against contractor under "hold harmless" clause of construction contract.

The court held that where the contractor's insurer agreed to pay all sums which the insured became obligated to pay by reason of the liability of others assumed by him under contract for damages, the insured's construction contract with the cooperative which established the contractor's liability to the cooperative solely by a "hold harmless" provision did not fall within the definition of a contract as set forth in the policy of insurance and, therefore, no coverage was afforded by the policy for the assumption of damages by the contractor under the "hold harmless" provision of the construction contract.

The court further held that neither waiver nor estoppel could create a contract of insurance or bring within the coverage of a policy a loss which by terms of the policy was expressly or otherwise excluded.

The case arose by way of a third party complaint filed by Robert Kincade, Eva Kincade, W. S. Kincade, of Clarksdale, Mississippi, doing business as Delta Construction Company against American Casualty Company, insurer.

The Kincades entered into a construction contract with C & L Rural Electric Cooperative Corporation for the construction of electric power lines. The contract contained a "hold harmless" or indemnity clause in favor of C & L. As a result of this contract, the Kincades obtained from American a contractor's performance bond, a workmen's compensation policy, and a liability insurance policy.

An employee of the Kincades, Grady L. McEntire, was injured while working on this construction project, and was paid benefits due him under American's workmen's compensation policy. He sued and recovered judgment in the amount of $40,000 against C & L. American Casualty Company, as the workmen's compensation carrier of the Kincades, participated in the trial to the extent of protecting its rights of subrogation under the Arkansas law, and was reimbursed the sum of $8,658.47 from the McEntire judgment in satisfaction of its said statutory lien.

Suit was then filed by C & L and its liability insurer, Employers Mutual Liability Insurance Company, against the Kincades to recover from them under the indemnity or "hold harmless" clause of the construction contract, the total amount they had paid McEntire and American. Judgment finding C & L negligent and responsible to the extent of 40% and the Kincades negligent and responsible to the extent of 60% for the damages sustained by McEntire was affirmed by the Arkansas Supreme Court and final judgment was then entered in the Circuit Court of Lincoln County, Arkansas. Kincade v. C & L Rural Electric Cooperative Corp., 227 Ark., 321, 299 S.W. 2d 67; C & L Rural Electric Cooperative Corp., v. Kincade, 221 Ark. 450, 256 S.W. 2d 337.

The first claim advanced by the Kincades was that under the clear and express language of the policy American is liable. The Kincades' liability to C & L, as claimed in C & L's suit against the Kincades and as it was established by final judgment in that suit, was solely by reason of the aforementioned "hold harmless" provision of the C & L - Kincades contract of February 6, 1947. This liability was not by operation of law but was assumed by contract.

The court held that the terms of the insurance policy did not cover Kincades' construction contract with C & L since such contract did not fall within the definition of "contract" as set forth in the policy.

The Kincades claimed that American was estopped to deny coverage in favor of them because they had requested full coverage for all risks arising from the construction contract and that Morgan, American's agent advised that they were so covered. The court stated that the evidence showed that Morgan did not have the "hold harmless" agreement in mind when the insurance was applied for and issued, and that the evidence was insufficient to work an estoppel against American, so as to enlarge or extend the coverage of the policy, beyond its clear and unambigious language.

The Kincades also alleged estoppel on the basis of American's conduct after the McEntire suit was filed as a result of which they were led to believe American recognized its liability under the insurance policy. The court ruled that estoppel cannot create a contract of insurance or so apply as to bring within the coverage of the policy property, or a loss, or a risk which by the terms of the policy is expressly excepted or otherwise excluded.

The court also held that the Kincades could not recover from American the amount recovered by American from C & L on American's statutory right under the workmen's compensation laws because the practical effect of allowing such recovery would be to hold that American's contract of workmen's compensation insurance extended to an obligation which the Kincades assumed independently under a contract.

Accordingly, the court held that there was no liability of American to the Kincades.

# # #

MILK CONTROL LAW - MINIMUM PRICES

(Shearer's Dairies, Inc. v. Milk Control Commission of the Commonwealth of Pennsylvania, (March 24, 1960) 159 A.2d 268.)

This is an appeal from the order of the Court of Common Pleas No. 6 of Philadelphia, affirming an order of the Milk Control Commission which suspended the appellant milk dealer's license for violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417, as amended, 31 P.S. § 700j-807. The court held that the appellant, (Shearer's Dairies, Inc.) entered into a contract with the Frankford Grocery Company, a corporation, whereby the appellant sold milk to the merchant members of the corporation at the minimum price established by the Commission for such sales and then paid 10% of the established price to the corporation. Such a contract was a device to circumvent the minimum price fixed for the sale of milk.

The court's summary of the evidence disclosed that the Frankford Grocery Company, a corporation owned by retail merchants, was organized as a cooperative purchasing and marketing association to purchase goods in large quantities and thereby eliminate the wholesaler's profit. By this method the merchant-stockholders of the company could compete with chain stores. The history, corporate structure and method of operation of this corporation are set forth in Philadelphia School District v. Frankford Grocery Company (1954) 376 Pa. 542, 103 A. 2d 738; Welch Grape Juice Co. v. Frankford Grocery Company (1939) 36 Pa. Dist. & Co. R. 653, and by the court in this case, Pa. D & C 2d (1959). Except for a few shares of stock held by the officers and employees of the corporation, all of its stock was owned by merchants in proportion to the amount of merchandise purchased by them from the corporation. The excess of receipts over total cost was distributed yearly by Frankford to its stockholders in proportion to the goods each purchased from the corporation. When a merchant withdrew from the cooperative, he was required to sell his stock to Frankford at a fixed price.

The court stated that as a result of Frankford's desire to get into the milk business without being subject to price regulations and Shearer's desire to increase its sale of milk, the two

corporations entered into the agreement which the Milk Control Commission and the court found violated section 807, supra, of the Milk Control Law. The contract related only to milk, cream, chocolate milk, and buttermilk - all products subject to price control under the Milk Control Law. Under the contract, Frankford listed in its bulletins the price-controlled milk products, along with ice cream and other products it sold to its members. Orders received by it from its stockholder-merchants for the price-controlled products were referred to Shearer who delivered the milk products directly to the merchants and kept individual accounts for each merchant. The bills for the merchandise were made in the name of the customers at the minimum price set by the Milk Control Commission and were sent weekly to Frankford who paid them. Shearer then paid to Frankford monthly 10% of the price of the milk products sold to Frankford's stockholder-merchants. The milk was sold under the name of "Unity", and Shearer had exclusive use of this brand name for the sale of milk to Frankford's stockholders during the life of the contract.

Shearer contended that the agreement with Frankford was a service contract through which it was paying a fee to Frankford for soliciting sales, investigating credit ratings, collecting bills, servicing accounts, advertising, and permitting use of its brand name. Frankford set up a separate account for the milk contract and assigned the profit made under the contract to surplus instead of distributing it to the merchant-stockholders. However, the court stated that this arrangement did not change the fact that the profit enhanced the value of the corporate stock owned by the merchants who bought milk products from Shearer, and that when these merchant-stockholders bought milk, 10% of the fixed price was paid back to a corporation owned and operated by them solely for their benefit.

The court asserted that an examination of section 807 of the Milk Control Law revealed that the legislature took unusual care to make it clear that all methods to circumvent the minimum price fixed for the sale of milk and to regulate milk products were illegal. The court concluded that the device used to return a part of the purchase price to the merchants resulted in sales of approximately $400,000 per year by appellant, undoubtedly business taken from other dealers who were charging the minimum price established by the Commission, and it held that the contract

between Shearer and Frankford was a device to circumvent the price established by the Milk Control Commission in violation of section 807, supra. of the Milk Control Law.

Accordingly, the court affirmed the order suspending the license of Shearer's Dairies, Inc.

# # #

INCOME TAX - CAPITAL CONTRIBUTIONS -

PAYMENT FOR SERVICES

(United Grocers, Ltd. v. United States of America, U.S.D.C. N. Dist. of Calif. So.Div. Memorandum Opinion No. 38411.)

In this action to recover an amount of $77,736.49 plus interest which plaintiff alleged was improperly determined by the Collector of Internal Revenue Service to be income tax payable for the year 1954, the court held that the evidence disclosed that the payments in question which were made to the plaintiff non-exempt cooperative by its member-contributors were for services rendered rather than capital contributions and as such were taxable income to the corporation.

Plaintiff, a cooperative, non-profit, membership (non-stock) corporation, was engaged in a general wholesale and retail grocery and merchandise business and in general business activity. It was not its purpose to realize profits or pecuniary gains for its members. The excess of its receipts from the obtaining for and delivery of goods to members over and above the expenses were returned to the members in the form of patronage refunds. The corporation sold groceries to both members and non-members at the same billing price, but only members received price reductions by way of patronage refunds.

Prior to 1952 the members were required to make monthly payments called "dues" to maintain their membership which the corporation included in its gross income. These payments were included with payments made for the purchase of groceries in computing patronage refunds and, therefore, they were, in effect, returned to the members and deducted by the corporation in determining its taxable income. There was no provision for return or repayment in any manner or at any time to a member upon withdrawal or resignation or otherwise of any sums paid in by him either as dues and/or assessments as contributions to capital.

The Articles of Incorporation and By-laws were in due course of time amended and in 1952 the corporation put a plan into effect to treat as "capital contributions" what formerly had been considered "dues". However, the only substantive difference in operation was that from 1952 "dues" were no longer included with grocery purchases in computing the amount due as patronage refunds, but were retained by the corporation.

Section 61(i), Internal Revenue Code, provides:

> "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items (1) compensation for services, including fees, commissions, and similar items."

Also provided in the Internal Revenue Code, Sec. 118, since 1954, is the following:

> "In the case of a corporation, gross income does not include any contribution to the capital of the taxpayer."

In view of these statutory provisions the court stated that capital contributions had to be distinguished from other types of payments to a corporation, for example, loans and payments for services rendered.

The plaintiff contended that its member-contributors received neither goods nor services in return for their monthly contributions, but the court observed that although they did not receive groceries for those payments, the member-contributors

received for their contributions the privilege and service of large scale purchasing power through their patronage refunds - a privilege and a service for which they would not have been eligible without payment of the monthly contributions. The plaintiff asserted, however, that the disbursing of patronage refunds or their equivalent was the singular, characteristic purpose of a buying and selling cooperative and that a holding that the contributions made by its members were not contributions to capital merely because they were tied in with this privilege and service would, in effect, be a holding that there could never be a capital contribution by a member to a cooperative corporation.

The court stated that when the question arises as to whether contributions from shareholders to ordinary corporations constitute income or capital contributions to the corporation little difficulty is presented. However, it agreed that when the problem arises out of contributions from shareholders or members to a corporation in which the proprietary interest and the patronage are united, i.e., the rendition of the services of the corporation are conditioned upon payment by the shareholders or members of the required contributions - as in the case of this plaintiff cooperative - it presents greater difficulty.

The court observed that the income tax law and regulations recognize that non-taxable capital contributions can be made to any corporation, cooperative or otherwise, and that it is natural that a cooperative should look primarily to its members for any necessary capital - and even to require capital from them as a condition of membership. It stated that for obviously practical reasons, therefore, the issue of whether claimed contributions to capital from shareholders or member-patrons of a cooperative, like plaintiff, constitute non-taxable contributions to capital should not be resolved by broadly holding that capital contributions are not legally possible in such a case, but rather by the application of further practical tests to determine whether the disputed contribution in a particular case is, in fact, a capital contribution as distinguished from a mere payment for services.

Several cases were cited by the court which held that payments made by shareholder patrons of cooperatives under certain arrangements were contributions to capital and as such not taxable

to the corporation. However, the court distinguished those cases from this case and stated that the monthly payments made to the plaintiff were not earmarked for certain purposes as was done in the cited cases but were simply designated as capital contributions instead of, as formerly, dues. The plaintiff's corporate papers contained nothing to preclude the use of such payments for any corporate purpose, operational or otherwise.

The court concluded that where contributions, although called capital contributions, are required by a cooperative from its members as a condition of the entitlement to its services, patronage refunds or otherwise, they should be held to be payments for those services, and, therefore, taxable income to the cooperative corporation unless the evidence, including the corporate papers of the cooperative, shows that the contributions carry other entitlements apart from the services and are so characteristic of capital contributions as to negative mere payment for services as their conclusive or primary purpose.

According to the court's ruling, such contributions should be earmarked in some way for capital of the cooperative as distinguished from their use in reduction of ordinary operative expenses for which other income or capital otherwise obtained exists. The contributor should be accorded some stated and definite entitlement to a return of his contribution either as a fixed term repayable loan, or at least, as a definitely stated equity interest in the cooperative returnable on dissolution, reducible in amount only through proration with other contributors similarly situated and subject only to the claims of creditors. Unless such characteristics of a capital contribution exist in the case of a cooperative of this kind, there is nothing to negate the prima facie inference that the required contributions were made with a view to and in consideration and payment for, services rendered by the cooperative to the member contributor. Further, unless such characteristics of a capital contribution are required in such a case, the door to tax avoidance is wide open.

The court found that the "contributions" in this case were not capital contributions, but payments by members in consideration of, and in payment for, the services rendered by the corporation to the contributors, and,therefore, were taxable income to the plaintiff corporation.

# # #

CONTRIBUTORY NEGLIGENCE - RASH ACT - ATTRACTIVE NUISANCE

(Joseph E. Brock, Administrator of the Estate of Ernest H. Shank, Deceased, v. Peabody Cooperative Equity Exchange. 352 P. 2d 37 and 352 P.2d 41,(1960)

These cases which are consolidated for purposes of summary involved actions to recover damages for the wrongful death of the minor son of Ernest Shank and for the death of the minor's mother who was asphyxiated by cyanide gas used to exterminate rats and insects in defendant's warehouse which warehouse she had entered in an unsuccessful attempt to save her son whom she had been informed was in the warehouse. In both cases defendant's demurrers to the petitions were sustained by the trial court. Upon appeal it was held that it was for the jury to decide whether the actions of the mother constituted contributory negligence and whether the actions of her son were those of a trespasser.

The evidence disclosed that on November 25, 1958, the defendant had administered to its wheat storage warehouse an amount of liquid cyanide gas to exterminate rats and insects which contaminated and destroyed the wheat. The defendant knew that the gas was both toxic and lethal to all forms of life. It was alleged that the warehouse was commonly used by children as an attraction and a place in which to play, and that such use by the children was with the knowledge and assent and tactic permission of the defendant's officials, agents and employees. It was further alleged that the warehouse was open and unguarded during the time complained of. The minor, age eleven years, ascended a ladder leading to the doors of the warehouse, such doors being 19 feet 10 inches above the ground. After the child had climbed the ladder he opened the door to the warehouse and became unconscious when he inhaled the fumes of the gas and fell forward into the warehouse where he died. When the child's mother learned of his whereabouts she went to the warehouse and opened the door whereupon she also became overcome with the funes which caused her death.

The complaints alleged negligence on the part of the defendants by failing to give notice to the public of the dangerous condition of the warehouse and not taking proper precautions to prevent persons from entering it.

Regarding the actions of the mother the defendant conceded the general rule of law that one who sees a person in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence as a matter of law in risking his own life or serious injury in attempting to effect a resuce, provided the attempt is not recklessly or rashly made.

The court held that it is not contributory negligence for a person to risk his life in an effort to save the life of another and that the law does not impute negligence in an effort to preserve human life unless made under such circumstances as to constitute rashness in the judgment of prudent persons. The court reversed the trial court's action in sustaining the defendant's demurrer and ruled that the question as to whether the mother's actions were rash was for the jury to decide.

Concerning the actions of the child, the defendant contended that he was at all times material a trespasser, was of sufficient age and capacity to be not free from fault and was guilty of contributory negligence.

The court stated that this was a case involving the attractive nuisance doctrine which is based upon the negligence of a proprietor who fails to protect young children attracted to his premises by some dangerous thing or place artificially created,and where he should have anticipated that children would be lured into the danger.

The court ruled that it could not be held as a matter of law that the warehouse in question did not constitute an attractive nuisance or that the deceased child was of such age that his actions were those of a trespasser, thereby barring the doctrine of attractive nuisance and making the decedent guilty of contributory negligence which proximately caused and contributed to his death.

# # #

MILK MARKETING ORDER - POOLING and PRICING
of
HANDLER'S OWN FARM PRODUCTS - COMPENSATORY PAYMENTS
of
NONPOOL HANDLERS

(Ideal Farms, Inc., Garden State Farms, Inc., Franklin Lakes Dairy Producers, Inc., and Ideal Farms Dairy Products, Inc.
v.
Secretary of Agriculture.
(2 cases) 181 F. Supp.62 and U.S. v. Lehigh Valley Cooperative Farmers and Suncrest Farms, Inc.; Lehigh Valley Cooperative Farmers, Inc. and Suncrest Farms, Inc.
v
Secretary of Agriculture
(3 cases) 183 F. Supp. 80)

These cases involved actions arising under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 et seq.

HELD: The Act authorized the Secretary of Agriculture to promulgate milk marketing order requiring pooling and pricing of milk moved to a handler's plant from a handler's own farm.

Compensatory payments required to be made by nonpool handlers into producer settlement fund result in price discrimination between pool and nonpool handlers.

Plaintiffs complained of action of the Secretary of Agriculture in dismissing their petition filed under 15 (A) of the Act to revoke certain sections of Milk Marketing Order No. 27, requiring the"milk of producer-distributors to be equalized for those located in Northern New Jersey", as well as other sections "insofar as they include any part of Northern New Jersey"in the marketing area of the Order. Plaintiffs questioned the validity of the Order on the basis of lack of due notice of the hearing and improper use of the record by the Secretary as well as improper rulings and orders by the hearing examiners and the Judicial Officer.

As to the issue of due process the court observed that on May 25, 1956, there was published in the Federal Register a notice of a hearing on proposals for a separate new milk marketing order for northern New Jersey. The notice was supplemented by one published June 6, 1956. The noticed hearing was convened at Newark on June 18, 1956, and hearings continued until December 20, 1956, but they were reconvened March 5, 1957, pursuant to a notice published February 27, 1957. A press release issued by the Secretary on February 21, 1957, announced that the reconvened hearing would be open for submission of evidence on a single marketing order for the Metropolitan New York-Northern New Jersey Areas, and this was confirmed by a notice of a hearing in the Federal Register on February 28.

The plaintiffs asserted that the hearing noticed on February 27 was a promulgation hearing contemplating a new regulatory order project rather than an amendment or modification of that scheme of regulation which had been under consideration by the Secretary since his published statement of December 15, 1955, and that the hearing notice of February 28 must necessarily have constituted a call for a "promulgation" hearing on March 5, and not a hearing upon a proposed amendment and that such notice, being less than the 15-day minimum prescribed by rules and regulations under the Act, was inadequate, which rendered the subsequent order invalid.

The court held that a comparison of the provisions proposed for inclusion in the Order referred to in the notice of May 25, 1956, with certain provisions in the existing Order No. 27, revealed striking instances of similarity and that from May 25, 1956, until the hearings terminated on March 29, 1957, the plaintiffs were upon full and continuing notice that they were to be subjected to the regulations as eventually set forth in Order No. 27. The court concluded that whether the order in which such regulations would be incorporated was to be a separate one for northern New Jersey, or an enlargement of the scope of the existing order covering metropolitan New York was immaterial insofar as the impact of the regulations upon the plaintiffs was concerned.

Concerning plaintiffs' allegations as to the improper use of record by the Secretary as a basis for decision, the court held that the testimony obtained at the hearings prior to March 5, 1957, was properly considered by the Judicial Officer in reaching his decision sustaining the comprehensive order proposed in the supplemental notice of February 28, 1957, since the evidence recorded

at the earlier hearings was not irrelevant to any of the issues considered at the later hearings and the basic plan of regulation expressed in each proposal was similar to that ultimately adopted.

Plaintiffs also contended that pooling and pricing regulations of a handler's own farm products were beyond the authority granted to the Secretary of Agriculture by statute. The court considered several court decisions which discussed the pertinent provisions of the Act and concluded that the terms "purchased from producers" and "purchased by handlers" were not to be literally construed and that the provisions of Order No. 27 regulating owner-producer milk of handlers within the area were authorized by the Act.

Plaintiffs also asserted that the compensatory payment provisions in Order No. 27 were in direct conflict with 608(c)(5)(A) of the Act which provides that when orders fixing or providing a method for fixing minimum prices for milk according to its classification such prices are to be uniform as to all handlers subject to certain adjustments. This assertion was based upon the authority of Kass v. Brannan, 196 F. 2d 791, certiorari denied 344 U.S. 891. In that case it was held that compensatory payments required by an order were part of the "minimum price" as that term was used in 608(c)(5)(A) of the Act and that since payment plus the actual cost to the plaintiff handler would result in a cost to him higher than the cost of like cream and condensed milk to pool-regulated handlers, such a requirement established a minimum price which was not uniform for all handlers as required by 608(c)(5)(A). The court stated that it would follow the decision of the Kass case and that since the total cost to plaintiff of the liquid milk sold in Northern New Jersey was not equal to the cost of its competitors, the compensatory payment provisions of Order No. 27 could not stand.

The court also considered other arguments advanced by plaintiffs that the compensatory payment provisions should be struck down since it was of the view that a decision on the matter would be relevant in the event that the Kass decision is overruled.

The plaintiffs argued that the compensatory payment provisions were not supported by the record. The court restricted its decision as to whether there was sufficient evidence in the record to support the Secretary's Order. It held that from a reading of portions of the administrative record it was convinced that there was sufficient evidence to support a finding of need for some form of Federal regulation of the sale of milk and its products by

nonregulated handlers in the Order No. 27 area and that the compensatory provisions were supported by the record.

As to the plaintiffs' argument that the compensatory payment provisions of the Order were not authorized by the Act,the court held that since it had already ruled that such payments were inconsistent with 608(c)(5)(A) they were not authorized by the Act. However,it stated that if its ruling regarding section 608(c)(5)(A) should be overruled, the question would remain as to whether such payments would be authorized as "incidental and necessary" to effectuate an order of the Secretary as those terms are used in 608(c)(7)(D). It held that an answer to that question would depend upon the particular order in which the terms were used. It concluded that sales of fluid milk in the area by nonregulated handlers posed a fundamental threat to an adequate return to farmers in the area and that since the compensatory payment provisions are calculated to check or greatly minimize this threat, they were calculated to carry into effect Order No. 27 and thus were authorized by the Act as "incidental" and "necessary" to carry out its terms.

The court also considered the question as to what effect an amendment of September 1, 1958,to Order No. 27 would have on the court's injunction which had held that until the issue of payments by plaintiff was settled such payments should be paid into the Registry of the court. By the amendment of September 1,1958, the Secretary made handlers such as plaintiffs who sold milk in the Order No. 27 fully regulated handlers unless they elect to be nonfully regulated handlers subject to the compensatory payment provisions of the Order. The Government argued that since plaintiffs made an election to be nonfully regulated handlers, a status which they had held automatically prior to the amendment, they were precluded from raising any objection as to payments made after the election because they failed to contest the legality of the amendment before the Secretary of Agriculture.

The court stated that it had to presume that the amendment was enacted to meet a real need in the milk industry and not to circumvent its injunction. It held that in view of its holding that the compensatory payment provisions were invalid no money should be paid the Market Administrator under the provisions of the amendment of September 1, 1958, regardless of whether the plaintiffs were nonpool plants by choice or necessity. However, the court contended that if its ruling regarding the validity of compensatory

payments upon review were to be set aside, the plaintiffs would owe the Market Administrator for the whole period from the time Order No. 27 was amended to include northern New Jersey to the present time.

# # #

INDENPENDENT CONTRACTOR or AGENT -

EVIDENCE OF LIABILITY INSURANCE

(Phillips Cooperative Gin Co. Appellant, v. Lillian Toll, Administratrix, 335 S.W. 2d 303)

Action by administratrix of estate of deceased automobile passenger for wrongful death of passenger killed in collision between automobile in which he was riding and truck. The court held that the evidence was sufficient to sustain a finding that the truck driver, who contended that he was an independent contractor but who failed to deposit evidence of liability insurance as required, was in the employ of Phillips Cooperative Gin Company at the time of the accident. The court also held that testimony respecting the requirement of an independent contractor to deposit evidence of liability insurance did not constitute erroneous injection of the question of insurance.

The administratix of the estate of Richard F. Toll, Sr., alleged that the collision between a car driven by deceased and a truck driven by W. T. Jackson was due to Mr. Jackson's negligence and that he was the agent, servant and employee of the Gin Company at the time of the accident. Judgment was rendered for the administratrix and the Gin Company appealed. On appeal the court held that the evidence was sufficient to sustain the verdict but the judgment was reversed because of an erroneous instruction and the case was remanded. (See Summary of Cooperative Cases - Legal Series No. 6, September 1958, pg. 42)

When the case was tried anew, the only issue submitted to the jury was whether Mr. Jackson was agent of the Gin Company at the time of the accident. The Gin Company and Mr. Jackson testified that he had been hauling for the Gin Company as an independent contractor over a period of years. A witness for the plaintiff testified that he was an acting chairman of the Arkansas Commerce Commission and that carriers of cotton seed were required by law to file securities in the form of a policy of public liability insurance and that upon searching the files of the Commission he discovered no record of Mr. Jackson's having filed anything.

The court held that if Jackson was merely acting as agent of the Gin Company, he would not have been required to file anything with the Commerce Commission and that under the circumstances the fact that nothing had been filed with the Commission was a fact from which a jury could draw the inference that the truck was being operated by the Gin Company.

Judgment for plaintiff was affirmed.

# # #